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Supreme Court of the United States

OCTOBER TERM, 1927.

NO. 612.

GREAT NORTHERN RAILWAY COMPANY,
Appellant,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

Appeal from the District Court of the United States for the District of Minnesota.

BRIEF OF APPELLANT.

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Dated March 30, 1928.

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Appeal from the District Court of the United States for the District of Minnesota.

BRIEF OF APPELLANT.

The opinion of the Court below is reported in 22 Fed. Rep. 2nd, 865.

GROUNDS OF JURISDICTION.

The judgment to be reviewed is an Order Dismissing Petition (Amended), dated October 19, 1927, and filed October 20, 1927 (R. 110 to 112 inclusive).

The petition in the Court below (R. 1-30 inclusive) asks the court to set aside, annul and suspend two certain orders made by the Interstate Commerce Commission dated June 17, 1925, and June 8, 1926, (Exhibits B and C of petition, R. 23 to 26 inclusive), purporting to determine the amount due to the appellant (petitioner below) from the United States under Section 209 of the Transportation Act of 1920 (41 Stat. 464, 1145), guaranteeing to appellant a certain net railway operating income for its operations during the guaranty period of six months immediately following Federal Control. The jurisdiction of the court below was invoked under the provisions of the Commerce Court Act of June 18, 1910 (c. 309, 36 Stat. 539), and the Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 219-221; U. S. C. 28:41), giving the court jurisdiction to set aside orders of the Interstate Commerce Commission. The order from which this appeal was taken was made by a court specially constituted under the provisions of the statute just cited, consisting of Hon. Wm. S. Kenyon, United States Circuit Judge; Hon. Joseph W. Molyneaux, and Hon. John B. Sanborn, United States District Judges. The respondents (defendants below) moved to dismiss the petition for lack of jurisdiction, upon the grounds, among others, that the order sought to be enjoined was not an order within the meaning of said statutes, but was merely a certificate of fact, and that Congress had not consented that the United States be sued in said court in said proceeding (R. 75-80, inclusive). The lower court held, upon the grounds just mentioned, that it had no jurisdiction and ordered the petition dismissed (R. 111-112).

The jurisdiction of this court is invoked under Section 210 of the Commerce Court Act of June 18, 1910 (36 Stat. 1146), Section 238 of the Judicial Code (U. S. C. 28:345), which provide for direct review by this court of an interlocutory or final judgment or decree of a district court in case an order of the Commission is sought to be enjoined, and upon the Urgent Deficiencies Act of October 22, 1913, (38 Stat. 220, U. S. C. 28:47) which also provides for this direct appeal.

STATEMENT OF THE CASE.

The judgment under review is an order dismissing our petition without any evidence having been taken. The judgment therefore assumes the accuracy of the facts stated in the petition and the facts so stated must be regarded as the facts and all of the facts upon which the decision of this court must be based.

Paragraphs I to VIII inclusive of the petition (R. 2-5) show that on March 1, 1921, in accordance with Section 212 of the Transportation Act (as added by the Act of February 26, 1921, 41 Stat. 1145), the Commission had "definitely ascertained" and certified that petitioner was entitled to a total amount of $12,500,000 as its guaranty under Section 209 of the Transportation Act "in addition to any further sums that might later be determined upon", and that appellant received payment of this entire amount. On June 17, 1925, or more than four years later, the Commission certified that appellant had been entitled to only $11,178,887.31, and that there was due the United States on account of overpayment to appellant a refund in the sum of $1,321,112.69 (Petition Exhibit B, R. 23). On

June 8, 1926, or nearly one year later still, the Commission ascertained that the amount due to appellant had been $11,170,214.02 (Petition Exhibit C, R. 24).

The petition alleges (Paragraph 12, R. 7) and it must therefore be taken as true, that appellant had not in fact been overpaid in any amount whatever, but that, on the contrary, all of the certificates had greatly understated the amounts due to appellant.

The Secretary of the Treasury demanded refund by the appellant of the alleged overpayment certified by the Commission, and the Comptroller General notified appellant that amounts due it for mail, freight and passenger transportation and other earnings would be withheld until the claimed refund should be made (Petition, Paragraph 18, R. 19). The Commission in making its certificates of 1925 and 1926, did not assert, and has not alleged or offered to prove in this action, that its "definite ascertainment" of $12,500,000 in its certificate of March 1, 1921, or that the money paid thereunder, was obtained by fraud or that any mistake of law or fact had been made.

We are attacking the later certificates of 1925 and 1926 upon the grounds:

1. That after having made a final determination of a larger sum and after payment of such sum to appellant, subsequent findings made four or five years later that the payment should have been smaller, and that a refund was due, had not the conclusive and binding effect of a certificate under Section 209 of the Transportation Act, and that the Commission had no jurisdiction to issue its subsequent certificates as such, but that the Government's only remedy would be an action for recovery of money

obtained by fraud, or paid under mistake, and that an order purporting to be a conclusive and binding certificate under Section 209, and on which the Secretary of the Treasury and Comptroller General are attempting to act, should be enjoined as not being within the jurisdiction of the Commission;

2. That even if the Commission still retained jurisdiction to issue a certificate under Section 209 for a smaller amount, and to find that a refund was due, its determination to that effect in this case was made under erroneous interpretations of the statute, and was subject to injunction for errors of law appearing upon the record. The various errors of law which we allege the Commission committed are set forth in Paragraphs XIII to XVII inclusive of the petition (R. 8-19).

The respondents contended below that the statutes conferring jurisdiction upon the district court to set aside orders of the Commission, apply only to orders made under the Interstate Commerce Act, such as rate orders; that the certificates in question are mere certificates of fact, made under another statute, and not "orders"; and that even though erroneous in law and in fact, they are not subject to cancellation by the district court. The lower court took this view and did not consider the alleged errors of law, but held that it had no jurisdiction whatever over the certificates, and could not set them aside, even though they were erroneous in fact and law.

The first question involved here, therefore, is whether the certificates in question are orders or requirements of the Interstate Commerce Commission within the meaning of the statutes giving the district court jurisdiction. If

this question is decided in the affirmative, we assume that this court will still be faced with the question whether errors of law are sufficiently alleged in the petition to warrant the setting aside of the orders. Therefore, while our alleged errors of law were not considered by the court below, we will undertake to explain or discuss them briefly here, after first discussing the preliminary question as to whether the certificates in question are "orders" of the Commission, and whether the district court had jurisdiction to correct any errors either of law or of fact, if they should be found to exist.

Before undertaking an argument of these questions, a somewhat fuller statement regarding the facts and the statutes may be helpful. The effect of Section 209 (c) of the Transportation Act (quoted in the Appendix to this brief), so far as appellant is concerned, was to guarantee to it for the six months following Federal control (the guaranty period) a net railway operating income equal to one-half of the annual compensation which it had received during Federal control. Section 209 (f), (also quoted in the Appendix to this brief), provides that in determining net railway operating income the amount of certain expenses to be charged against gross revenue should be determined by the Commission in a certain prescribed manner. The errors of law which we allege in the later paragraphs of our petition all involve claims that the Commission failed to comply with the requirements of this section in making this determination of our operating expenses.

Section 209 (g) provides that the Commission shall ascertain and certify to the Secretary of the Treasury the amounts necessary to make good the guaranty and that he

should draw warrants therefor. Section 209 (h) provides that upon certificate of the Commission and "during the guaranty period" *advances* might be made from time to time, not in excess of the "estimated amount necessary to make good the guaranty." This section requires the carrier to execute a contract for refund of any excess payments. Under this provision the appellant received advances of $6,500,000.00 during the guaranty period (petition, paragraph V, R. 2) and agreed to refund any excess, securing this agreement by a deposit of Liberty Bonds (petition, paragraph VII, R. 3). It will be noted that the section last quoted permitted *advances* "during the guaranty period" only, and did not permit any advances to be made after the guaranty period but before final determination of the whole amount due.

In this situation Section 212 was added to the Transportation Act on February 26, 1921 (41 Stat. 1145). It will be noted that this was after the guaranty period but before any final settlement with the appellant. This section did not mention "advances" nor provide for any refund of excess payments, but did provide that the Commission "if not at the time able finally to determine the whole amount due * * * may make its certificate for any amount definitely ascertained by it to be due" and provided that the Secretary of the Treasury might draw warrants upon such certificates. In accordance with this provision the Commission issued its certificate of March 1, 1921, (petition, Exhibit A, R. 22) ascertaining and certifying "that the amount of six million dollars ($6,000,000.00) in addition to any other sum or sums heretofore certified in favor of the carrier under Section 209 of the Transportation Act, 1920, is necessary to make

good to said carrier the guaranty provided by said section." The Commission further certified "that such amount of six million dollars ($6,000,000.00) cannot be reduced by further accounting or otherwise, and there may be, upon further investigation, additional amounts found due to said Great Northern Railway Company * * *". In accordance with this certificate the Secretary of the Treasury paid to appellant the further sum of six million dollars ($6,000,000.00), making twelve million five hundred thousand dollars ($12,500,000.00) in all (petition, paragraph VIII, R. 5). This paragraph of the petition also shows that the latter certificate was made in a pending proceeding before it in which appellant had claimed a very much larger amount.

More than four years later, that is on June 17, 1925, the Commission made the first of its orders which are under attack here, showing that the total amount to which appellant had been entitled was only $11,178,887.31, and that a refund was due from appellant to the United States of $1,321,112.69 (petition, Exhibit B, R. 23). Almost a year later still, that is on June 8, 1926, the Commission made the last of its orders under attack here, finding that the total due appellant had been $11,170,214.02 (petition, Exhibit C, R. 24).

Following each of the latter two orders the Secretary of the Treasury demanded payment of the refund by appellant; and following the latter order the Comptroller General notified appellant that amounts due to it from the United States for mail, freight and pasesnger transportation would be withheld pending payment of this refund, and thereupon the Comptroller General did in fact withhold such amounts in excess of two million dollars (peti-

tion, paragraph XVIII, R. 19). Thereupon, and solely for the purpose of obtaining said payments, appellant entered into an agreement with the Comptroller General (petition, Exhibit D, R. 26), under which appellant pledged with the Comptroller General bonds in the amount of $1,625,000.00, to secure payment of said refund if it should be found to be due, and the Comptroller General thereupon released the $2,000,000.00 due to appellant as aforesaid for transportation earnings. The said Liberty Bonds were to be held by the United States as security until final determination of the Government's claim for refund, either by decision of a court of last resort having jurisdiction, or by agreement of the parties.

This action is brought in accordance with the said agreement with the Comptroller General, for the purpose of determining the validity of the Government's claim to refund. The petition seeks to enjoin the certificates of the Commission, to enjoin the withholding of the pledged Liberty Bonds and of payments otherwise due to appellant, and the use of the certificates of the Commission for any purpose.

The answer of the United States contains a motion to dismiss on the ground that the District Court was without jurisdiction. The answer further moves for a dismissal of the petition on the grounds: (a) That the petition is without equity on its face and does not state any cause of action against the United States, and, (b) That the appellant has not shown irreparable or other injury which entitled it to the relief prayed for.

The answer of the Commission contains, as a separate defense, allegations which are equivalent to a motion to

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SPECIFICATION OF ASSIGNED ERRORS.

Appellant intends to urge all of the errors set forth in the assignment of errors on page 114 of the record, which are as follows:

I.

Said Court erred in holding that the two certificates of the Interstate Commerce Commission, dated June 17, 1925, and June 8, 1926, respectively, which purport to fix the compensation due to the petitioner under the guaranty of its earnings for the period from March 1, 1920, to September 1, 1920, under the terms of Section 209 (41 Stat. 464) and Section 212 (41 Stat. 1145) of the Transportation Act of 1920, are not orders which could be enjoined or annulled under the provisions of the acts giving said Court jurisdiction to review orders of the Interstate Commerce Commission.

II.

Said Court erred in holding that Congress has not consented that the United States be sued in this Court in this proceeding.

III.

Said Court erred in dismissing the petition for want of jurisdiction.

OUTLINE OF ARGUMENT.

In our main argument we will discuss, first, the jurisdiction of the court to review these certificates in an injunction proceeding and to determine whether or not they are erroneous; and, second, whether the certificates are so far erroneous as to call for injunctive relief. In this preliminary statement we shall give a brief outline of our argument on both of these questions but will reverse the order above stated and outline first our arguments showing why we believe the certificates are erroneous.

Are the certificates in questions erroneous as a matter of Law?

We shall contend that they are erroneous, first, because the Commission had no jurisdiction to make them, and, second, because if it had jurisdiction it failed in exercising it in such a way as to comply with the specifications and requirements of the Statute which defines the items to be computed and the manner of computing them.

In support of our argument that the Commission had no jurisdiction to make its certificates of 1925 and 1926, we shall argue that having made, in 1921, a definite ascertainment that $12,500,000 was due the carrier and that amount having been paid, the Commission could not thereafter set this finding aside and find that the carrier had been entitled to only a little over $11,000,000, and recover refund of this, without proof of fraud or mistake in the original finding. Whether the certificate of 1921 for $12,500,000 be regarded as analagous to the judgment of a court, to a legislative act, to an administrative determination or to an award of arbitrators, it was completed by

the payment of the money which became vested in the carrier, and neither the Commission or any other agency of the government had any jurisdiction years afterwards to reopen the finding and issue a fiat calling for refund of part of the payment, by summary action, and without any claim of either fraud or mistake in the prior finding.

The government seemed to concede that this would be true of a final determination of the entire amount due the carrier, made under Section 209(g), but claimed that a partial determination under Section 212 was similar to a certificate for an advance under Section 209(h) and that, therefore, the preliminary finding was without effect and that the Commission could reduce it by summary action and call for a refund without showing either fraud or mistake in its original finding.

We assert the following grounds for claiming that a certificate of partial payment made under Section 212 is no more subject to reopening by summary action than would be a final certificate under Section 209(g).

(1) The wording of Section 212(a) clearly indicates that a finding made thereunder is pro tanto a definite and final ascertainment.

(2) It provides for payment of the money without agreement or security for refund. Such payment could be enforced by mandamus.

(3) It is in marked contrast with the wording of Section 209(h) under which "advances" were to be made with provision for refund of over-payment if any.

(4) Section 212(a) is in marked contrast with Section 212(b) which provides that these certificates of partial payment shall be "prima facie but not conclusive evidence of their correctness", *only as to a certain limited class of*

items. This clearly implies that the certificate is conclusive and not merely prima facie as to all other items.

(5) Correspondence before the Congressional Committee which was considering Section 212 prior to its passage shows an understanding that findings made under Section 212 were to be conclusive (see letter from Chairman Clark of the Commission to Chairman Esch of the Congressional Committee which was copied in Appendix B to this brief).

It follows that the certificate of 1921 was pro tanto as certain and definite as a final certificate under Section 209(g) and no more subject to reopening or reduction by summary action.

The suggestion has been made that it would not be physically possible or practicable for the Commission to make a partial certificate under Section 212, as certain and as binding as we allege this certificate of 1921 to be, until its investigations were complete and it was ready to make its final certificate under Section 209(g). This is not so. The Commission might well find some items as to which it would feel certain at once, or with little investigation, and other items which are doubtful and require more detailed consideration. Without waiting to resolve the doubtful items, it might well make its partial certificate under Section 212 covering the certain items, or some percentage of them which would leave a reasonable margin of safety. Clearly this is what Congress intended, and what the Commission did and we submit that it had no jurisdiction thereafter to reopen or reduce this certificate by summary action.

If the Commission should suspect that there was some error or fraud in its original finding it might of course investigate the matter, reach a conclusion, and record it.

as a basis for action against the carrier based on mistake or fraud, and we would have no right to enjoin such action, because such an action would not purport to fix the legal status of the parties. But in this case the Commission has gone farther and issued what purports to be a binding certificate under Section 209 of the Transportation Act. The Treasurer and Comptroller General of the United States have accepted it and acted upon it as such. An order of this character is beyond the jurisdiction of the Commission and therefore subject to injunction.

Even if the Commission had jurisdiction to make an order of this character, calling for a refund by the carrier, its order in this case is erroneous because it failed to comply with the provisions of Section 209(c) of the Transportation Act, which govern its findings as to the proper amount to be charged against gross revenues and operating expenses, in determining net railway operating income. We allege four different respects in which the Commission's order violates the statute in this regard. We shall not attempt to outline these points here because they do not admit of sufficiently brief explanation, but will reserve them for discussion in the latter part of the brief.

Has the court jurisdiction to enjoin certificates of this character if satisfied that the Commission had no jurisdiction to make them or that they are otherwise erroneous?

We assert jurisdiction under the provisions of the Urgent Deficiencies Act, giving a specially constituted district court of three judges jurisdiction of actions to enjoin *any* order or requirement of the Commission. We realize that this court has pointed out in U. S. vs. Los Angeles and Salt

Lake R. R., 273 U. S. 299, and in other cases, that a court has no jurisdiction to enjoin a merely negative order, or a mere finding of fact which does not alter the legal status of the parties, but this court has frequently held that the district court has jurisdiction to enjoin orders which purport to change, create, or destroy legal rights.

We shall argue that the certificates in question purport to finally fix the status of the parties and create a legal obligation from the appellant to the Government; that they purport to create a cause of action which could be enforced by the mere production of the certificate and without further evidence, or used as an offset or counterclaim in the event of suit by the appellant against the Government. If the Commission had jurisdiction to make the order and if no errors of law were committed, the certificate would undoubtedly have this effect.

It is argued that these certificates are not orders because they are not so labeled, because they are directed to the Treasurer of the United States and not to the carriers, and because they do not order or command anyone to do anything. We shall argue that whether an instrument is an "order" depends upon its legal effect and not its label. An order is a written instrument signed by the Commission which creates, destroys or alters legal rights. This certificate has the same *legal* effect as though it had the word "order" at the top and as though it "ordered, adjudged and decreed" that the United States recover of the defendant a million dollars, or as though it expressly ordered defendant to pay the million dollars. By all legal tests it is an order.

It is argued that the machinery of the Commerce Court and of its successor the specially constituted district court

of three judges was intended to supplement the Commission's machinery for the regulation of commerce, and that the court's jurisdiction should not apply to orders issued under a Statute such as the Guaranty Act which is not a part of the Interstate Commerce Act, which does not regulate Commerce, and which confers a mere temporary authority to discharge a special function not connected with the regulation of commerce. Apparently, this argument would deny the court's authority to *enforce* special orders of this sort as well as to *enjoin* them. This argument treats the case as it would if the jurisdiction to fix the amount of the guaranty had been conferred upon some officers or branch of the government other than the Commission.

Our answer will be that in the Guaranty Act, Congress conferred on the Commission (and not on any other branch of the government) authority to determine the amount of this guaranty. The Commission upon which this power was conferred was the Commission as it then existed, with its existing machinery and procedure, including the procedure for review of its orders. Congress first declared in the Urgent Deficiencies Act that orders of the Commission might be enjoined. Later in the Guaranty Act it said that the amount of this guaranty should be determined by order of the Commission. It knew, when it said it, that orders of the Commission, without any limitation as to their character, were specially made subject to court injunction. It imposed this function upon the Commission probably because it considered the Commission peculiarly equipped to discharge it. If the Commission was peculiarly equipped to discharge the function in the first place, then it is equally reasonable to argue that the special court which reviews

other orders of the Commission is peculiarly suitable to review this one. At any rate, specific jurisdiction is given to review *any* order of the Commission, and if we are correct in arguing above that this certificate is an order, then it follows by expressed terms of the Statute that the court has jurisdiction.

It is argued that while the Urgent Deficiencies Act appears to give the court jurisdiction to enjoin *any* order of the Commission, this should be construed as limited to orders other than for the payment of money, because jurisdiction to *enforce* orders of the Commission are thus limited. It is said that the law contemplated a means of enforcing orders on the one hand and of enjoining them on the other hand and that these two actions were to be reciprocal and to apply to the same kinds of orders. It is said that since *enforcement* actions are limited to orders other than for the payment of money, *injunction* actions should be limited in the same way. It is argued that the reasons which induced Congress to limit the jurisdiction over enforcement actions in this way are equally applicable to injunction actions. These alleged reasons are that money awards involve only individual rights and not public interest so that their enforcement is properly left to individual action; and that money awards are, under Section 16(2), only prima facie evidence of the facts therein stated, and are, therefore, subject to collateral attack. It is said that these are the reasons why the *enforcement* of money awards is not vested in the special court, and that they are equally effective reasons why the special court should not be given jurisdiction to *enjoin* such orders.

Our answer to this is that the act is explicit in its terms. It expressly declares that the enforcement powers of the

court shall be limited to orders other than for the payment of money, but that the injunction powers shall apply to "any order."

As we have just pointed out it is argued that since ordinary money awards are only prima facie evidence of the facts therein stated and since they are, therefore, subject to collateral attack on the facts as well as the law, therefore, the remedy by injunction is not necessary and should not apply. But it should be noted that the provision that money awards are only prima facie correct, which appears in Section 16(2) of the Interstate Commerce Act, applies only to money awards *for violations of the Interstate Commerce Act*. Under Section 16(1) such awards are made only when "the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this act for a violation thereof." Even if it be granted that ordinary money awards for violations of the Interstate Commerce Act are not subject to injunction, for the reason just stated, it does not follow that these guaranty certificates, which are conclusive on matters of fact, should not be subject to injunction. They are much less open to collateral attack than an ordinary money award would be.

Even in the case of ordinary money awards, it may well be argued that Congress had a reason for providing for direct review by injunction. It would be possible to deny a direct review of *all* orders, and leave all errors to be corrected by collateral attack in enforcement actions. The direct review, however, certainly is more orderly, in the case of money awards as well as in the case of other orders. A money award might run against many parties in many parts of the country and a collateral attack might

be made in different courts with varying results. There is, therefore, good reason why full effect should be given to the express provision in the Statute that the special court should have jurisdiction of actions to enjoin any order or requirement of the Commission, even though it be an order for the payment of money.

In this particular case, there is an additional ground of equity jurisdiction which does not exist in the case of an ordinary money award. Paragraph 18 of the Petition shows that the government undertook to collect this refund by withholding a large number of items due the carrier for transportation of mail, passengers and freight, and that the carriers' only redress would have been by multiplicity of actions brought against the United States for the recovery of these items, in all of which the government would have pleaded the Commission's certificate of 1926 as a counterclaim. Even if the certificate would have been subject to collateral attack when set up in the counterclaim to each of these actions, a multiplicity of litigation of the same question might have resulted. Similar situations, of course, might arise in the case of any money award, and this is an additional reason why a direct review should be permitted through injunction proceedings.

Finally, it is argued that the jurisdiction over controversies with the government in general is provided for in other tribunals and by other statutes, and, therefore, it cannot lightly be assumed that Congress intended to confer jurisdiction over this particular controversy which involves the government, on this special court of limited jurisdiction. It is said that while the Urgent Deficiencies Act permits these suits against the United States in name, it was not intended to cover suits which are against the United States in substance as well as in name.

If this argument were sound it would apply equally to rate cases in which the government was a party. Our answer to it is that there is no such exception in the Urgent Deficiencies Act.

We shall argue that these last two contentions, based on the fact that the order involves the payment of money, and on the fact that the government is a party, are both resolved against the government in Dayton-Goose Creek Railway Co. vs. U. S., 263 U. S. 456. In that case the order was made under the recapture provision of the Interstate Commerce Act. It was an order for a money payment, and the payment was to be made to the government, so that both of the arguments to which we have just been referring would have been as applicable in that case as they are here. It is true that the order in that case also requested the carrier to report what provision it had made for setting up the reserve fund for one-half of the excess income, but it did not order or direct the carrier to take any action as to the part of the excess earnings which were to be retained by it. The only thing that the carrier was ordered to do was to pay money to the government, and yet this court sustained jurisdiction to enjoin the order. The case just referred to and the arguments which we have summarized in this outline will all be more fully discussed in the body of the argument.

ARGUMENT.

THE COURT'S JURISDICTION INCLUDES ORDERS FOR THE PAYMENT OF MONEY.

The jurisdiction of the court below was based upon the Commerce Court Act of June 18, 1910, (36 Stat. 1146) and upon the Urgent Deficiencies Act of October 22, 1913 (38 Stat. 208). Section 207 of the Commerce Court Act defined the jurisdiction of the Commerce Court in part as follows:

> "The Commerce Court shall have the jurisdiction possessed by circuit courts of the United States and the judges thereof immediately prior to June eighteenth, nineteen hundred and ten, over all cases of the following kinds: *First.* All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission *other than for the payment of money. Second.* Cases brought to enjoin, set aside, annul, or suspend in whole or in part *any order* of the Interstate Commerce Commission."

Section 208 of the Act, (36 Stat. 1149) provides in part:

> "Suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the Commerce Court against the United States * * *."

It will be noted that the jurisdiction of the Commerce Court is defined as that "possessed by circuit courts of the United States" and it is therefore necessary to inquire

what jurisdiction the latter courts had in cases of this character.

The Hepburn Act of June 29, 1906, (34 Statutes 584), in Sections 4 and 5 amends Sections 15 and 16 of the Act to Regulate Commerce, February 4, 1887, (24 Stat. 379), as amended. Section 16 of the Act to Regulate Commerce, as thus amended, gives to the Interstate Commerce Commission power to make orders for the payment of money damages and provides that if the carrier fails to pay the complainant the amount so ordered, the complainant may institute an action for damages in the Circuit Court of the United States. It also provides:

> "If any carrier fails or neglects to obey any order of the Commission, *other than for the payment of money*, while the same is in effect, any party injured thereby, or the Commission * * * may apply to the circuit court * * * for an enforcement of such order.
>
> * * * the court shall enforce obedience to such order by writ of injunction, or other proper process, mandatory or otherwise * * *."

Immediately following this provision is one conferring jurisdiction on the circuit courts "to enjoin, set aside, annul or suspend *any order or requirement of the Commission*."

It thus appears that the *enforcement* of orders of the Commission is provided for (1) in the case of orders for the payment of money, by an action for damages in the circuit court and (2) in the case of orders other than for the payment of money, by application to the circuit court for enforcement of the order by appropriate process of the court. On the other hand there is a single general

provision providing for the *annulling* of *any* order or requirement of the Commission, without specifying whether it be for the payment of money or otherwise. This jurisdiction, as thus vested in the circuit courts, was transferred to the Commerce Court by the provision above quoted.

The Commerce Court was abolished by the Urgent Deficiencies Act of October 22, 1913 (38 Stat. 208) and the jurisdiction theretofore possessed by the Commerce Court was transferred to the various district courts of the United States (p. 219).

Section 208 of the Commerce Court Act quoted hereinbefore appears as Section 208 of the Judicial Code, (44 Stat. 869; U. S. C. 28:46) and varies from the portion hereinbefore quoted by substituting the words "district court" for the words "Commerce Court" in the Commerce Court Act, so that at the present time, the Judicial Code provides "that suits to enjoin, set aside, annul or suspend any order of the Interstate Commerce Commission shall be brought in the district court against the United States. * * *."

Consequently, the district courts now have jurisdiction: (1) to enforce any order of the Interstate Commerce Commission other than for the payment of money, and (2) to enjoin, set aside, annul or suspend in whole or in part any order of the Interstate Commerce Commission.

THE COMMISSION'S CERTIFICATE IS AN "ORDER" WITHIN THE MEANING OF THE COMMERCE COURT ACT AND URGENT DEFICIENCIES ACT.

The amended order of the District Court of October 19, 1927, dismisses the petition for want of jurisdiction on two grounds, first, that the certificate is not an order within the meaning of the jurisdictional statutes, and second, that Congress has not consented that the United States be sued in the District Court in this proceeding.

Under Section 208 of the Judicial Code, the suit must be against the United States if the case is within the category therein stated. This is an express consent of Congress that suit may be brought against the United States in an action to enjoin, set aside or annul, an order of the Interstate Commerce Commission. We assert that the certificate is an order within the meaning of the jurisdictional statutes and we seek to enjoin it. It follows, then, that if we are correct in our assertion that the certificate is an order, the District Court is in error in its holding that Congress has not consented that the United States be sued in this proceeding.

The propriety of the court's action rests, then, upon the answer to the question: Is this certificate of June 8, 1926, an order within the meaning of the Commerce Court Act and the Urgent Deficiencies Act?

Counsel for the Government and the Commission below cited numerous cases in which the courts have held that acts of the Commission, which are orders in form, are not orders within the meaning of the Commerce Court Act, and counsel for the Government, intimated that we rely upon "the much-worn argument that *'any order'*

is justiciable under the Commerce Court Act." In support of their position that not every act of the Commission which is an order in form may be enjoined by the courts, counsel cited *Proctor & Gamble v. United States*, 225 U. S. 282, and various other cases. On the other hand we can cite many cases in which orders of the Commission have been enjoined. *I. C. C. v. Northern Pacific Railway Co.*, 216 U. S. 538, *I. C. C. v. D. L. & W. R. R. Co.*, 216 U. S. 531, *Southern Pacific v. I. C. C.*, 219 U. S. 433, *U. S. v. Diffenbaugh*, 222 U. S. 42, *U. S. v. B. & O.*, 231 U. S. 274, *Tap Line Cases*, 234 U. S. 1, *Philadelphia & Reading Ry. v. U. S.* 240 U. S. 334, *Central R. R. v. U. S.*, 257 U. S. 247, *U. S. v. New York Central*, 263 U. S. 603.

The cases just cited all involve orders made under the Interstate Commerce Act and so do the orders in the cases cited by the Government where injunction was refused. It is obviously true that there are some acts of the Commission which are orders in form which will not be enjoined. It is equally true that there are many acts of the Commission which may be enjoined. The problem, then, is to determine a rule from the decided cases and ascertain upon which side of the line our present case falls.

An excellent statement of the views of the court on this question appears in *I. C. C. v. Union Pacific R. R.*, 222 U. S. 541, at 547, as follows:

> "There has been no attempt to make an exhaustive statement of the principle involved, but in cases thus far decided, it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mis-

take of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the lementary rule that the substance, and not the shadow, determines the validity of the exercise of the power.

"In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. 'The findings of the Commission are made by law *prima facie* true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience.' *Ill. Cent. v. I. C. C.*, 206 U. S. 441. Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision, involving as it does so many and such vast public interests, can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order."

The Court has sustained jurisdiction and has given relief from orders because of the consideration by the Commission of improper evidence or the failure to consider proper evidence. *U. S. v. Abilene & Southern Ry.*, 265 U. S. 274, *I. C. C. v. Louisville & Nashville R. R.*, 227 U. S. 88.

The provision of the statutes that jurisdiction to enjoin any order of the Commission is conferred upon the courts, and the foregoing decisions, would make the jurisdiction of the court seem very clear in this case were it not for the fact that notwithstanding the provisions of the statute some orders of the Commission have been held not to be within the jurisdiction of the court to review.

In considering what actions of the Commission are and what actions are not within the jurisdiction of the court, it is necessary to distinguish between cases in which jurisdiction has been refused and cases in which jurisdiction has been entertained but injunction denied. The motion to dismiss in this case raises both the questions. That is, the motion might be granted because of lack of jurisdiction of the court or it might be granted because, on the facts stated, the order is not one which should be enjoined. In resisting the motion, it seems incumbent upon us to discuss both questions. The latter question, as to whether upon the facts stated the order is one which should be enjoined, will be discussed in a later part of this brief. For the present we are discussing the question whether the court has jurisdiction and want to consider the cases upon that point.

A few of the numerous cases in which the court has held that it had jurisdiction but declined to give the relief sought are *Intermountain Rate Cases*, 234 U. S. 476, *Los Angeles Switching Case*, 234 U. S. 234, *United States v. Pennsylvania Railroad*, 266 U. S. 191. A recent case of this nature is *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. U. S.*, 48 Sup. Ct. Rep. 189, decided January 3, 1928.

These cases are clearly distinguishable from the class of cases wherein the court has held that the acts of the Commission complained of were not orders within the meaning of the jurisdictional statutes and, consequently, that the lower court had no jurisdiction.

There is a large class of cases in which an attempt has been made to enjoin an order of the Commission because of mistake of fact and in which the order has been considered by the court and jurisdiction entertained but the petition denied. We shall point out later that our case is not within that class and we simply mention these cases here in order to point out that they have no bearing upon the question of jurisdiction.

It may be stated generally that the cases in which injunction has been denied because of *lack of jurisdiction* are cases in which the so-called order of the Commission did not change the status or obligations of any individual or body and was therefore held to be not an order within the meaning of the statute. This general class of cases in which the Commission's order did not affect or change any status includes two or three sub-classes. One subclass is represented by *Proctor & Gamble v. U. S.*, 225 U. S. 282; *Hooker v. Knapp*, 225 U. S. 302, and *Lehigh Valley R. R. Co. v. U. S.*, 243 U. S. 412. In this class of cases the Commission had been asked to grant some affirmative administrative relief such as the establishment of a car service rule or the extension of time for a certain action, and declined to do so. Here a cancellation by the court of the Commission's order would amount to a granting by the court of the administrative relief requested, or else would leave the carrier in the same position that the Commission's order left it, and the same position in which

it was in before the Commission was appealed to for relief. The Commission's action did not change the status of the parties and was therefore held to be not an order. These cases are somewhat weakened by *U. S. v. New River Coal Co.*, 265 U. S. 533. Another subclass of such cases is that in which the order is merely procedural, as to set a case for hearing, but not changing any rights or obligations. *U. S. v. Illinois Central R. R.*, 244 U. S. 82. A third sub-class is represented by *U. S. v. Los Angeles & Salt Lake R. R.*, 273 U. S. 299, in which an order valuing railroad property was held to be a mere finding of fact by the Commission which was not binding upon any party and did not change its legal status. An examination of all of the cases in which the decision amounts to a denial of jurisdiction and not merely to a denial of the relief sought will disclose that in no one of them had any substantial rights of any of the parties been modified by the Commission's action. This thought is well expressed in the following language from the *Los Angeles & Salt Lake* case:

> "The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, anything; which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation. This so-called order is merely the formal record of conclusions reached after a study of data collected in the course of extensive research conducted by the Commission, through its employees. It is the exercise solely of the function of investigation. Compare *Smith v. Inter-*

state Commerce Commission, 245 U. S. 33. Moreover, the investigation made was not a step in a pending proceeding in which an order of the character of those held to be judicially reviewable could be entered later."

Contrasted with these cases, where the courts have refused to entertain jurisdiction, are the numerous cases of affirmative orders of the Commission which have been held subject to review. Thus where the Commission misconstrued the meaning of words or the kind of evidence necessary to establish a violation of the statute the Courts will correct the order. See *Southern Pacific v. I. C. C.*, 219 U. S. 433, where an order of the Commission cancelling a lumber rate was enjoined; and *I. C. C. v. N. P. Ry.*, 216 U. S. 538, where an order establishing through rates from Northern Pacific to Union Pacific points through Portland, Oregon, was enjoined; and *Philadelphia & Reading Ry. v. U. S.*, 240 U. S. 334, where an order finding certain rates to be discriminatory was enjoined on the ground that the Commission had erred as a matter of law; and *Central R. R. v. U. S.*, 257 U. S. 247, wherein the Commission found that the railroad was guilty of discrimination and the Commission's order was enjoined on the ground that the Commission had erred as a matter of law and that no carrier could be found to be guilty of discrimination, in violation of the Act, unless it is a party to the situation which is alleged to be preferential; *U. S. v. Diffenbaugh*, 222 U. S. 42, wherein the court enjoined an order by the Commission setting aside a railway company's allowance to a shipper for elevating his own grain though the allowance was reasonable and the service was a necessary part of the transportation, the order being

made upon the erroneous theory that it gave the shipper an unlawful advantage over shippers not owning elevators; *U. S. v. Baltimore & Ohio R. R.*, 231 U. S. 274, wherein a similar order of the Commission relating to free lighterage was enjoined; *U. S. v. New York Central R. R.*, 263 U. S. 603, wherein an order of the Commission prescribing passenger rates lower than the rates prevailing theretofore was enjoined because it appeared to be based upon an erroneous conception by the Commission of the intent of the law; *Tap Line Cases*, 234 U. S. 1, wherein the Commission had made an order prohibiting trunk lines from making certain allowances on traffic destined to companies owning the tap lines on the theory that the tap lines were plant facilities and not common carriers, the court holding that the definition of the term "common carrier" was a judicial question and that the Commission's conclusions thereon were subject to review as a question of law; *Interstate Commerce Commission v. D. L. & W. R. R.*, 216 U. S. 531, wherein an order of the Commission directing the construction of a connection between a branch line and another railroad on application of the branch line was enjoined because the statute giving authority to the Commission to make such orders required that an application must come from the shippers.

It is not necessary that the act complained of constitute a command or a direction in order that the court may have jurisdiction. If the act complained of is merely permissive, as giving a carrier a privilege which it would not have except for the Commission's act, but a privilege which it is not compelled to take advantage of, it may be enjoined. Thus in *Chicago Junction case*, 264 U. S. 258, the court upheld jurisdiction to review an order of the

Commission constituting a certificate permitting the New York Central to lease a terminal road in Chicago. Similarly, in *Colorado v. U. S.*, 271 U. S. 153, a certificate permitting a railroad to abandon operation over a portion of its line was held to be an "order." To the same effect is *Texas v. Eastern Texas R. R. Co.*, 258 U. S. 204. In *Home Furniture Company v. U. S.*, 271 U. S. 456, a certificate permitting acquisition of one railroad by another was held to be an order. In *Venner v. Michigan Central R. R. Co.*, 271 U. S. 127, it was held that an action by a stockholder seeking to enjoin the issuance of securities authorized by a certificate of the Commission was in effect an attempt to enjoin an order of the Commission and that the action would not lie unless brought in the manner provided for in the Urgent Deficiencies Act.

An excellent summary of the views of the court on this question is found in the *Los Angeles & Salt Lake* case, *supra*. Remember that this was a case in which the court held that a final valuation was not an order which could be enjoined. The court said however:

> "The so-called order here complained of is one which does not command the carrier to do or refrain from doing anything; which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation."

If the order complained of can be brought within any of the foregoing classes the court has jurisdiction.

Plainly the certificate now before us does purport to

determine rights and obligations. If the Commission had jurisdiction to make this certificate and committed no errors of law in doing so, it follows that the effect of the certificate *ipso facto* is to create a cause of action in favor of the Government and against the Railway Company for $1,300,000. It is immaterial what the actual facts or the actual merits may be. We would be foreclosed from litigating them. The Government need merely bring its action and submit this certificate in evidence and its case is won. Or if we should sue for mail pay and the Government should set up a counterclaim, its counterclaim is established by the filing of this certificate. No showing of fact or equity with which we might wish to attack the certificate would be received. The valuation order in the *Los Angeles & Salt Lake case* was merely *prima facie* evidence and did not establish or deny any legal rights, but the certificate of the Commission in our case purports to be and, if valid, is a final adjudication of legal rights amounting to $1,300,000, and forecloses further litigation upon the question.

In the *Los Angeles & Salt Lake* case the court says of the Commission's valuation order—

> "It was merely preparation for possible action in some proceeding which may be instituted in the future—preparation deemed by Congress necessary to enable the Commission to perform adequately its duties, if and when occasion for action arises. The final report may, of course, become a basis for action by the Commission, as it may become a basis for action by Congress or by the legislature or an administrative board of a State."

The certificate of the Commission in our case is much more than this. To be sure, it may become the basis for an action to recover a refund, but it, in itself, if valid, creates a cause of action, which is the very important distinction between the present order and the order in the Salt Lake case. This certificate purports to be, and, if valid, is a final adjudication of the rights of the parties with respect to this controversy.

According to the Government's contention, the certificate of June 8, 1926, creates a cause of action against the carrier and in favor of the Government for a refund of a portion of the payment previously made. The certificate of June 17, 1925, (Exhibit B of Petition, R. 23) expressly certifies that there is due to the United States on account of overpayment to the carrier the sum of $1,321,112.69. The final certificate of June 8, 1926, (Exhibit C, R. 24) omits a statement of the amount due to the Government but does certify a total amount necessary to make good the guaranty to the appellant which is substantially less than the total amounts previously paid.

The brief filed below by counsel for the Commission, in an attempt to show that this certificate is not determinative of rights and obligations within the meaning of the language used by the court in the *Los Angeles & Salt Lake Case*, *supra*, said:

> "In an analogous sense the certificate might be said to determine the rights and obligations under the guaranty section in that it determines the whole amount due, but like the valuation, it represents solely the exercise of the functions of investigation, for it is left to the Secretary of the Treasury to take final action upon the Commission's determination, such action involving an *independent judgment* at least as

> to the amount in fact due the carrier after giving consideration to the carrier's obligations on account of advances and partial payments already made it under the provisions of the guaranty section."

The above is not a correct statement of the effect of the Commission's certificate. The certificate represents more than the exercise of the functions of investigation, and it is not left to the Secretary of the Treasury to form an independent judgment,—not even as to the amount due. As we have pointed out above, the certificate purports to be a final disposition of the controversy as to the amount of the guaranty due to the carrier and the Secretary is bound to accept it as such. He could not raise or lower the amount of the Commission's estimate. Conceivably he might make up his mind that the Commission had no jurisdiction and proceed to disregard the certificate but he would do so at his own peril. Under no circumstances could he make a finding that the Commission's certificate was erroneous and proceed to substitute a determination of his own, because Sections 209 and 212 of the Act specifically direct the Secretary of the Treasury to pay all certificates made by the Commission, leaving him no discretion as to the amounts which shall be paid.

The situation is very similar to that in *Dayton Goose Creek Ry. Co. v. U. S.*, 263 U. S. 456. There the order of the Commission fixed the amount of the excess income of the carrier payable to the United States under the recapture provisions of Section 15a of the Interstate Commerce Act (as amended by the Transportation Act, 1920) (41 Stat. 488). This order, like our certificate, might later become the basis of an action at law, but nevertheless the

court in that case took jurisdiction and disposed of the case on the merits.

Counsel for the Commission took the position below that no act of the Commission is an "order" within the meaning of the Commerce Court Act unless the act is in performance of some duty or in the exercise of some power given to the Commission by the Interstate Commerce Act. Counsel states that Section 209 and Section 212 of the Transportation Act are not parts of or amendments of the Interstate Commerce Act and that consequently this court has no jurisdiction even though the certificate is of the category considered to be an "order" by the courts. No such limitation on the jurisdiction of the court can be found in the language of any of the jurisdictional statutes. They relate to any order of the Interstate Commerce Commission and the only limits on the jurisdiction of the District Courts which has ever before been made arise from the cases of negative and procedural orders which we have cited hereinbefore.

It is true that the cases where the court has declined to take jurisdiction or has assumed jurisdiction under the Urgent Deficiencies Act are all cases arising under the Interstate Commerce Act. These cases then throw no light upon the question whether the order must be made under the Interstate Commerce Act.

The right to enjoin unlawful acts or orders of administrative bodies or officials has been recognized by the Supreme Court. *O. R. & N. Co. v. Fairchild*, 224 U. S. 510. *N. P. Ry. v. Department of Public Works*, 268 U. S. 39. It is obvious therefore that the right to injunction applies in a proper case to an unlawful order or act either of the Commission or of any other administrative body purport-

ing to act under any law whatever. The only question is whether the case at bar is a proper case for injunction and not whether the order purports to be made under one Act or another.

The power to make certificates such as the one now before us was conferred by Congress on the Interstate Commerce Commission by the Transportation Act, 1920. At that time the Interstate Commerce Commission was an existing body with existing rules of practice and subject to certain laws of procedure and its acts were specifically made subject to review by the court. When the duty and power of making a determination as to the amount of the carrier's guaranty was conferred upon the Commission presumably Congress had in mind the Interstate Commerce Commission as established and functioning and as subject to all of the laws of procedure for review then governing it. One of the characteristics of this body on which the power of making a determination of the guaranty was conferred, was its subjection to review by injunction. We submit that this situation raises a strong presumption at least that Congress intended that an order determining the amount of the guaranty should be subject to the same procedure as any other order of the Commission and that in absence of any evidence of contrary intent the presumption should be conclusive.

Neither the Hepburn Act nor the Commerce Court Act nor the Urgent Deficiencies Act restrict the jurisdiction of the courts to orders made under the Interstate Commerce Act. Courts of the United States, inferior to the Supreme Court, must derive their jurisdiction from Congress, but when Congress has conferred jurisdiction on an inferior court in particular classes and kinds of

cases then the court has jurisdiction in cases of that class which arise under statutes subsequently passed. *In re Metzger*, Federal Case No. 9511. Just as the courts have power to review by injunction orders of the Commission made under amendments to the Interstate Commerce Act passed subsequent to the Urgent Deficiencies Act (*Chicago Junction case*, supra; *Colorado v. U. S.*, supra; *Texas v. Eastern Texas R. R. Co.*, 258 U. S. 204; *Venner v. Michigan Central R. R.*, supra) so has the court jurisdiction to review by injunction orders made by the Commission under any other acts giving powers to it.

If the act of the Commission which is sought to be reviewed is within the class which is held by the courts to constitute orders of the Commission, then the fact that it was made in performance of a duty imposed by some act other than the Interstate Commerce Act is not material.

Counsel for the Commission made the further point that this is merely an order for the payment of money and that since the jurisdiction of the court to *enforce* is limited to orders other than for the payment of money, the jurisdiction to *enjoin* is subject to the same limitation. Assume that this certificate is in fact merely an order for the payment of money, within the meaning of the Commerce Court Act—which is doubtful—still jurisdiction of the district courts is to *enjoin any order of the Commission*. The jurisdiction of the court to *enforce* extends to any order of the commission *other than for the payment of money*. Expression of the limitation in the case of the class of orders which may be enforced followed immediately by a designation of orders which may be enjoined without any such limitation would, under the usual rules

of statutory construction, show the intent of Congress not to include the restriction in the class of orders which may be enjoined. *Expressio unius est exclusio alterius.*

It is conceivable, of course, that Congress might have withheld any remedy whatever for direct review of any Commission orders, or it might have withheld such direct review in the case of orders for payment of money and granted it as to all other orders. Even in the case of orders which do not call for the payment of money, but which fix rates or grant other affirmative relief, if errors of law are committed by the Commission the carrier or party against whom enforcement is sought might have an adequate defense by collaterally attacking the order in the action brought to enforce it. In this respect orders for the payment of money do not differ from other orders. The remedy by collateral attack is just as available and no more available in one case than in the other.

In both classes of orders, however, the remedy by collateral attack is less orderly, and clean cut than a remedy by direct review. Several parties may be interested and collateral attacks may be made in several different courts with varying results. We can suggest no reason why Congress should have provided for a direct review in either class of cases except that it is more orderly than the method by collateral attack and this reason applies just as effectively in the case of orders for the payment of money as in the case of any other order.

The authorities establish the following principles relating to what constitutes an "order" which may be enjoined. If the act is simply a procedural step it is not an order. If it is a denial of administrative relief it may not be enjoined because the court is without power to grant ad-

ministrative relief since that power is lodged in the Commission. As expressed by the cases, a negative order will not be enjoined. On the other hand, if it is an act directing or permitting affirmative action or is an order purporting to fix liabilities, rights, obligations or duties, where but for the order there would be no such liabilities, rights, obligations or duties, then the district court has jurisdiction to enjoin it as an "order" under the Urgent Deficiencies Act. As expressed in the cases, *an affirmative or permissive order is subject to the court's jurisdiction.* If such an order is made by the Commission under a misconception of the law defining its powers or upon no evidence or improper evidence, then the court will exercise its power to enjoin, set aside or annul the order. Clearly the certificate in the present case is an affirmative order and the court has jurisdiction to hear and determine the case on the merits.

Whether this certificate is an "order" does not depend whether it is labeled "certificate" or "order" nor on whether it "orders, adjudges and decrees that the United States recover from the carrier" or simply certifies that the amount is due. Whether a horse is a horse depends upon its characteristics and not upon its label, and the same is true of an order. Technically an order is a written instrument, signed by the Commission and having certain legal effects. The legal effects of this instrument are identically what they would be if it were labeled an "order" and if it ordered the carrier to pay. Under either wording it creates the same obligation and with the same effectiveness and would be enforced in the same manner.

The reason why orders for the payment of money were excluded from the enforcement side of the Court's juris-

diction is apparent when it is remembered that an action for damages was provided for in the same section of the Hepburn Act and consequently jurisdiction to enforce orders for the payment of money was not otherwise necessary. On the other hand no reason appears in the statute for excluding orders for payment of money from the injunctive side of the court's jurisdiction.

To be Entitled to Injunctive Relief it is Not Necessary to Show that the Remedy at Law is Inadequate.

In the first sub-heading under the Argument in this brief we have pointed out that while in actions for *enforcement* of orders of the Commission a distinction is made between orders for the payment of money and orders other than for the payment of money, when we come to the provision regarding actions to *annul* or *set aside* an order of the Commission no such distinction is made. Jurisdiction is conferred upon the court in broad terms to annul any order or requirement of the Commission.

We have also pointed out that a remedy by direct review is more orderly than a remedy by collateral attack even in the case of money awards, because several parties may be interested and collateral attacks may be made in several different courts with varying results. It would have been possible to have left the aggrieved party to depend upon a collateral attack in actions to enforce any order of the Commission whether for the payment of money or not, but Congress saw fit to make a sweeping provision that "any order or requirement" of the Commission might be reviewed by injunction.

In the *Dayton Goose Creek case*, supra, the order sought to be enjoined requested the carrier to report to the Commission what provision it had made for setting up the reserve fund for one-half of the excess income and to remit the other half of the excess income to the Commission under the provisions of the recapture clause of Section 15a of the Interstate Commerce Act. The order complained of did not direct the carrier to do any particular thing with the one-half of the excess to be retained by it. The only direction requiring affirmative action related to that portion of the excess income payable to the United States under the provisions of the act. Any one of the reasons given as the basis for the request for the injunction could have been set up in an action at law brought by the Government to enforce its claim. Consequently the petitioner had an adequate remedy at law. The opinion of the court recites that the question of jurisdiction was not pressed on appeal. The court assumed jurisdiction and proceeded to dispose of the case on the merits.

It is true that the objection to jurisdiction was not pressed in the *Dayton-Goose Creek* case. But jurisdiction cannot be conferred upon a court by consent of the parties and even though the question of jurisdiction is not raised it is the court's duty to consider the matter of jurisdiction before proceeding with the merits. In *Chicago, Burlington & Quincy R. R. Co. v. Willard*, 220 U. S. 413, the court says:

> "It is firmly established by many decisions that in every case pending in an appellate Federal court of the United States, the inquiry must always be whether under the Constitution and laws of the United States that court or the court of original jurisdiction could take cognizance of the case."

In *M. C. & L. M. Ry. Co. v. Swan*, 111 U. S. 379, the Court says:

> "This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it."

Consequently the action of the court in the *Dayton Goose Creek case* in assuming jurisdiction is authority for the point that the court had jurisdiction even though there was an adequate remedy at law. The case seems entirely parallel to our own and clearly sustains the jurisdiction of the court in this case even though there may be an adequate remedy at law.

NECESSITY FOR RELIEF TO THE PETITIONER.

During the oral argument before the lower Court a question was asked from the bench whether we were not contending that the Commission's certificate of June 8, 1926, on which the Government's claim for refund is based, is an absolute nullity and, whether, if such be the case, there is any necessity for relief against something which is a nullity. A void order outstanding may become the basis of vexatious litigation on unauthorized acts performed in reliance on its purported validity. A direct review of such an order by injunction is recognized as proper in *Skinner & Eddy Corporation v. United States*, 249 U. S. 557.

In our petition we allege and claim five different grounds for cancellation of this certificate. One of these claims is that the Commission had no jurisdiction and that the certificate is therefore a nullity. But we also claim that even though the Commission had jurisdiction

to make the certificate calling for the refund, this particular order is erroneous and subject to judicial review because of errors of law in the interpretation and construction of statutes and contracts, and because of errors in considering improper evidence and in failing to consider other evidence, which we allege to be material and controlling.

An order which is erroneous for such legal reasons is not necessarily a nullity. It is like the judgment of a lower court which is subject to review for error of law but which is valid and enforceable until corrected upon review. While one contention which we make is that the order is a nullity, we are relying on various other contentions as to errors of law in the making of the certificate and we are entitled to be heard on these.

We have pointed out above that where errors of law are alleged to exist in an order of the Commission, while there may be an adequate remedy by collateral attack in an action brought to enforce the order, it is much more orderly and logical to provide a remedy by direct review. This is just as true of an order for the payment of money as of any other order. By express wording of the statute Congress has provided for such a direct review in the case of all orders.

The above reasoning is equally applicable where the error consists of an improper assumption of jurisdiction, as in the case of any other error of law. The Commission's action purports to be an order which may become the basis of vexatious litigation. Just as an appeal should be allowed from a judgment of a lower court made without jurisdiction, so orderly procedure requires a direct review of an order of the Commission made without jurisdiction.

An order of the Commission fixing intrastate rates, without a finding of discrimination against interstate commerce, would be a nullity for want of jurisdiction, but a means of direct review would be desirable. The policy of Congress and the express words of the statute seem to provide for such review. Therefore, even though no other errors of law were alleged in our petition, we still should be entitled to the injunction sought.

Before leaving this question of jurisdiction we desire to comment upon a suggestion made in the Court below by counsel for the Government. It will be noted that Exhibit D attached to the petition (R. 26) is an agreement under which the Comptroller General of the United States agreed that he would not attempt to collect the refund alleged to be due from the appellant under the Commission's certificate of June 8, 1926, by holding back moneys due from the United States to the appellant for transportation of mail, freight and passengers, in consideration of a deposit by the appellant with the Comptroller General of government securities sufficient to secure the said refund. Counsel for the Government intimated below that having made our solemn agreement with the Government depositing these bonds, the present action is an attempt to avoid the consequences of that contract. Obviously this is not so. The very purpose of the contract was to procure a release of funds due to us and give security demanded by the Government pending the outcome of an action which was then contemplated by the appellant. Notice that the contract specifically recites (R. 26) "* * * it is understood that an action against the United States to test the validity thereof (the Commis-

sion's certificate) is contemplated by the Railway Company." Further (R. 28), the contract states "The claim of the United States shall be deemed to have been finally determined, or a final determination thereof made, when it shall have been decided by the Court of last resort having jurisdiction thereof or shall have been settled by an agreement in writing between the parties thereto." Further, (R. 29), we agree not to bring any suit for the recovery or redelivery of the securities "saving and excepting such suit or action as may be necessary to be brought to determine the validity of said claim."

The Facts Alleged in the Petition are Sufficient to Establish the Conclusion that the Commission's Order is Erroneous.

One of the motions for the defense challenges the sufficiency of the facts alleged to establish error in the Commission's conclusion. If the defense is correct in contending that our petition contains insufficient facts the motion to dismiss will have to be granted. It therefore seems incumbent upon us to oppose this contention. We will point out briefly and without extensive argument wherein we believe that the order is in error, though this discussion goes rather to the merits of the case than to the question of the jurisdiction of the court.

The first ground upon which we claim the Commission's order to be erroneous is the contention already referred to, namely, that having issued its certificate finally ascertaining that at least $12,500,000 was due on March 1, 1921, the Commission was without jurisdiction thereafter to issue a further certificate in the nature of a conclusive finding,

purporting to be binding upon the Treasurer and the Comptroller General, that a lessor amount should have been found and that a refund was due. In raising this point we desire to make it clear that we are not contending before this court that the Commission's certificate of March 1, 1921, was conclusive in the sense that it could not be set aside for fraud or mistake of fact. It is not necessary to make any such contention as that. It may be subject to attack for mistake if the Government can allege and prove that a mistake was made. What we do contend, however, is that after such a certificate has been issued and payment made thereunder, neither the Commission nor any other department of the Government has been given authority to issue a fiat or order for refund which is *per se* binding and conclusive upon us, and that any attempt to issue a certificate or order purporting to have that effect is subject to injunction.

In order to test this question let us consider the status which would exist if, instead of a partial certificate under Sec. 212, a final certificate and payment had been made under Section 209g of the Transportation Act. Assume that such final certificate has been made and the amount thereof paid and that thereafter the Commission should attempt to issue an additional or supplemental certificate for a lesser amount and calling for a refund, and consider what the effect of such a supplemental certificate would be.

If the Commission would have power four or five years after making a final adjudication, to reopen the matter and make an adjudication for a smaller amount which would be binding upon the appellant, then it would have the same power ten years, fifty years or one hundred years later.

There is no statute giving it such power and no statute prescribing the time when such power must be exercised. It would be impossible to draw the line at the close of any particular period.

In order to determine the question whether the certificate of March 1, 1921, can be set aside by the Commission without any proof of fraud or mistake, it does not seem necessary to determine whether the original certificate is judicial or legislative or administrative in its nature, because we might admit that it is either and it would still be beyond the power of the Commission to set it aside by summary action.

If we regard the certificate of March 1, 1921, as judicial in its nature, and hold that the Commission was acting as a court, it would be going beyond any power ever exercised by any court to hold that the court can, four or five years afterwards, and on its own motion, without any finding of fraud or mistake, issue another judgment calling for a refund of a portion of the money paid under the first judgment.

If it be argued that the certificate of March 1, 1921, was made under a delegation of legislative authority, the Commission being empowered to complete the statute by filling in the amount of the guaranty, then it follows that if this authority has been exercised the power of the Commission is exhausted. If Congress itself had passed a grant of money it could not validly enact another statute at the following session reciting that its committee had made a mistake or that it had granted too much money and that the excess should be refunded. Certainly some allegation and proof of a mistake would be required in such a case.

If the act of the Commission be regarded as executive or administrative in its nature, like the award of public land, certainly title vests when the grant is made and cannot be recalled by subsequent executive or administrative action, at least without proof of mistake or fraud. No tribunal can make an award of that sort and still retain a string upon it.

Maxwell Land Grant Case, 121 U. S. 325, 379.

United States vs. California & Oregon Land Co., 148 U. S. 31, 43.

United States vs. Louisville, 169 U. S. 249.

Wright vs. Yuchausti & Co., 272 U. S. 640.

The case of *United States vs. Wildcat*, 244 U. S. 111, involved an enrollment made by the Dawes Commission under the provisions of the Curtis Act of June 28, 1898, and the Creek Agreement of March 1, 1901. It was held that this was conclusive unless impeached by very clear evidence of fraud or mistake. The court said (page 118):

> "In that act the Commission was authorized to investigate the subject, and its action when approved by the Secretary of the Interior was declared to be final. There was thus constituted a *quasi*-judicial tribunal whose judgments within the limits of its jurisdiction were only subject to attack for fraud or such mistake of law or fact as would justify the holding that its judgments were voidable. Congress by this legislation evidenced an intention to put an end to controversy by providing a tribunal before which those interested could be heard and the rolls authoritatively made up of those who were entitled to participate in the partition of the tribal lands. It was to the interest of all concerned that the beneficiaries of this division should be ascertained. To this end the Commis-

sion was established and endowed with authority to hear and determine the matter.

"A correct conclusion was not necessary to the finality and binding character of its decisions. It may be that the Commission in acting upon the many cases before it made mistakes which are now impossible of correction. * * *

"When the Commission proceeded in good faith to determine the matter and to act upon information before it, not arbitrarily, but according to its best judgment, we think it was the intention of the act that the matter, upon the approval of the Secretary, should be finally concluded and the rights of the parties forever settled, subject to such attacks as could successfully be made upon judgments of this character for fraud or mistake."

It has frequently been held that where matters are submitted to arbitration and an award made the authority conferred upon the arbitrator is exhausted and he has no power subsequently to reopen the matter and change the award. *Bayne vs. Morris*, 68 U. S. 97, 99; *United States vs. Farragut*, 22 Wall. 406, 419-420; *City of St. Charles vs. Stookey*, 154 Fed. 772; *Flannery vs. Sahagian*, 134 N. Y. 85; *Maud vs. Patterson*, 49 N. E. 974; *Moran Bros. vs. United States*, 61 C. Cls. 73, 99.

We know of no sort of a decision by any kind of a tribunal or body, duly authorized to act, and under which rights have vested, which can be set aside or reopened by summary action of the same body without express statutory authority and without proof of fraud or mistake.

Our right to this money became vested when the certificate of March 1, 1921, was made. We could have enforced payment of it at that time by mandamus proceed-

ings against the Secretary of the Treasury. *Kendall v. U. S.*, 12 Pet. 524. When the money was paid we had title to it, which we could defend against all comers. The money was subject to transfer by us and our title was complete in every way. It seems obvious, then, that no Government tribunal can create a valid cause of action for refund of a part of it by its mere unsupported fiat. There is no precedent in the whole field of law for the creation of a cause of action in that way. Whether a payment be made by the state or a municipality, or a corporation, or an individual, no right to refund exists except upon proof of fraud or mistake.

If a cause of action for this refund has arisen, it would be very difficult to classify it or to state what principle of law it depends upon. Neither tort nor contract is alleged or proven. There is no agreement, express or implied, no estoppel and no equity. The position of the Government is not only that it is not required to prove any mistake, but that we should not be permitted to negative any mistake in the original payment. Even though we are prepared to come into court and prove that no mistake was made and that we were underpaid rather than overpaid, the Government would claim that such allegations and proofs are immaterial and that on the mere fiat of the Commission the refund is due regardless of equities. We know of no other instance in the law where any Governmental body, judicial, executive, administrative or legislative, can create a cause of action by mere fiat without submitting proof of some sort.

To argue that there was an implied contract on our part to refund any excess if due, assumes that some excess is due, without proof, and begs the question. There

can be no implied contract in this case, and certainly there is no express contract and no tort. No action can be maintained in the nature of an action for money had and received without proof that too much money has been paid or that a mistake has been made.

The argument that the Commission's final finding is not conclusive, assumes a jurisdiction in the Commission to investigate alleged overpayments and to issue findings thereof. Such a jurisdiction can only be created by statute and such a statute would probably be unconstitutional. In any event we have no such statute and no authority whatever on the part of the Commission to make any further investigations or findings after final payment.

We have been discussing this question so far as though the order of March 1, 1921, were a final certificate issued under Section 209g instead of a partial certificate issued under Section 212. We submit, however, that the effect of a partial certificate under Section 212 is *pro tanto* the same as that of a final certificate under Section 209g. Section 209g provides that the Commission shall "ascertain and certify" the several amounts due and that the Secretary is authorized to draw warrants for the same. Section 212 provides that if the Commission is not able finally to determine the whole amount due it "may make its certificate for any amount *definitely ascertained* by it to be due" and that the authority of the Secretary of the Treasury to draw warrants is applicable.

Paragraph (a) of Section 212 seems to make it very clear, standing by itself, that a definite ascertainment made under its provisions, is as conclusive *pro tanto* as would be a final certificate under Section 209(g). But there is another provision which makes this even more

clear. Paragraph (b) of Section 212 provides that in the case of deferred debits and credits an estimate may be made which shall be *prima facie* but not conclusive. Deferred debits and credits include such items as liability for damage claims, taxes, etc., which are accrued on the books in some assumed amount at the time liability arises, but which can not be definitely ascertained as to amount until later. As to these items Section 212(b) permits payments to be made upon an estimate, but with an express provision that such estimates "shall be prima facie but not conclusive evidence of their correctness in amount in final settlement." If Congress had intended the entire finding under Section 212(a) to be only prima facie and not conclusive there would have been no object in adding Section 212(b). When it expressly declares in Section 212(b) that the estimate on certain specific items is only prima facie it infers that it is conclusive as to all others. *Expressio unius est exclusio alterius.*

A comparison of Section 212 with Section 209h confirms this reasoning. In Section 209h Congress makes specific provision for the possibility of mistake and provides for security for refund. This section provides for mere advances and not for definite payments. If Congress had intended, in Section 212, to provide for mere advances, it would have been necessary only to strike out the words "during the guaranty period" in Section 209h, thus making it possible to make advances, *after*, as well as *during* the guaranty period. The whole wording of Section 212 makes it very clear that Congress intended that the partial payments should be just as conclusive as a final payment.

In the decision in the Great Northern Guaranty Case, 111 I. C. C. 318, (R. 81) the Commission made an elaborate argument to the effect that its certificate of March 1, 1921, was issued hastily because the carrier was in need and that the matters were not fully considered. These may all be cogent reasons why Section 212 should not have been passed or why the certificate should not have been issued. But Section 212 was enacted and there is no ambiguity in it,—its terms are controlling. Congress knew that the Interstate Commerce Commission was not able to make a final certificate for the entire amount, but permitted it to make partial payments on supposedly safe margins. Congress deliberately assumed the risk of a possible mistake or overpayment. In the face of this statute, we submit that it is beyond the jurisdiction of the Commission, after making its certificate of March 1, 1921, and after the payment had been made thereunder, to issue a certificate to the Secretary of the Treasury for a lesser amount with the motive and intent and for the purpose of inducing the Secretary of the Treasury to bring action against us or to withhold payments due us.

In Finance Docket No. 1606, 70 I. C. C. 711, the Commission itself adopted the view which we are expressing here when it said on page 714:

> "We are required to make a definite ascertainment for partial payment purposes as clearly as we are required to make a definite ascertainment in final settlement."

OTHER GROUNDS OF INVALIDITY IN ORDER.

Aside from the contention which we have just been arguing, that the Commission's certificates of 1925 and 1926 were erroneous and subject to injunction because the Commission had no jurisdiction at the time to issue certificates in such form, in the face of their previous definite ascertainment of a larger sum, we allege several other errors of law which we believe are sufficient to invalidate these particular certificates, even though it should be held that the Commission at this time had jurisdiction to issue subsequent certificates for smaller amounts, without proof of fraud or mistake in the previous certificate. Assuming that the Commission had authority under Section 209(g), without proof of fraud or mistake in its previous certificate, to issue a final certificate for a smaller amount than that named in its original certificate, it was still obliged in making such final certificate to conform to the provisions of Section 209(c), which prescribes how its computations should be made. Our petition alleges several respects in which it failed to comply with these requirements. In considering these allegations of the petition it must be remembered that the motion to dismiss on the ground of failure to allege facts sufficient to state the cause of action is in the nature of a demurrer and consequently admits, for the purpose of the motion, all of the allegations of the petition. *Chicago Junction case*, 264 U. S. 258.

These errors of law are set forth in paragraphs XIV to XVII of our Petition, (R. 10-19 incl.) and our contentions with regard to them may be briefly summarized as follows:

Section 209 (c)-(1) guarantees a net railway operating income during the guaranty period equal to one-half of

the annual compensation under the Federal Control Act (40 Stats. 451) for use of the property during Federal control "including * * * the increases * * * provided for in Section 4 of the Federal Control Act." Section 4 provided that compensation during Federal control should be "increased by an amount reckoned at a reasonable rate per centum to be fixed by the President upon the *cost* of any additions and betterments, less retirements, and upon the cost of road extensions to the property of such carrier *made* by such carrier with the approval of or by order of the President while such property is under Federal control."

Suppose the Great Northern, at the beginning of Federal control, was in the process of constructing a new tunnel with a total cost of $1,000,000. On January 1, 1918, the beginning of Federal control, $900,000 had been spent but the tunnel was not yet completed to operate. During Federal control the tunnel was completed with an additional expenditure of $100,000. In this state of facts the Commission in computing the increased compensation under Section 4 allowed interest only on the $100,000 of expenditures made during Federal control. We claim interest on the full cost of $1,000,000, since that is in literal compliance with the section, being the *cost* of the addition. The addition *made* during Federal control was the completed tunnel.

The literal application of the section conforms with the equities of the situation. Additions are made to reduce operating expenses and consequently to increase net income. Since the uncompleted tunnel had no effect on operating expenses during the test period (the years July 1, 1914, to June 30, 1917, used as a basis in fixing Federal

control compensation), the net income during the test period, and consequently the compensation during Federal control was less than if the tunnel had been in use. To measure the benefit derived from the use of the tunnel during Federal control, the increased compensation must be based on the full cost of the tunnel. Our interest payments are increased by, say 5% on a million dollars worth of bonds issued to finance the tunnel, with the expectation that the net profit from railway operations will be increased sufficiently to more than offset this added interest. The Government received the entire increase in the profit from railway operations, which presumably exceeded the interest on the entire expenditure for the tunnel, but offers to pay the carrier increased compensation based only on one-tenth of the cost, leaving the carrier to bear the burden of interest charges on the other nine-tenths.

This is an error of law and not one of fact because it results from a misinterpretation by the Commission of the provisions of Section 4 of the Federal Control Act, providing for increased compensation based on "cost" of improvements "made * * * while such property is under Federal control."

This illustrative case of the tunnel is typical of the claim we make in Paragraph XIV of the Petition, (R. 10) of error in the certificate.

The claim in Paragraph XV (R. 12-14) involves this situation. Paragraph (f)-(3) of Section 209, provides that in measuring the maintenance expenses which may properly be used in determining the guaranty the Commission shall apply the rule of Section 5(a) of the standard Federal control contract. Congress sought to avoid extravagant maintenance charges during the guaranty period,

which would decrease net income and consequently increase the amount necessary to make good the guaranty.

Section 5(a), of the Federal Control Contract (R. 12), paraphrased, provides that during the period of Federal control the Director General shall as nearly as practicable, expend for operating expenses or pay into funds sums which may be necessary in order that the property may be returned to the owner at the end of Federal control in substantially as good repair as it was on January 1, 1918, the beginning of Federal control; "provided, however, that the annual expenditure and charges for such purposes during the period of Federal control on such property * * *, or the payment into funds of an amount equal in the aggregate (subject to the adjustments provided in paragraph (c) and to the provisions of paragraph (e) of this section) to the average annual expenditure and charges for such purposes included under the accounting rules of the Commission in railway operating expenses during the test period, * * *, shall be taken as a full compliance with the foregoing covenant."

The adjustments called for in paragraph (c) referred to are shown in the following quotation (R. 13):

> "In comparing the amounts expended and charged under the provisions of paragraphs (a) and (b) of this section with the amounts expended and charged during the test period, due allowance shall be made for any difference that may exist between the cost of labor and materials and between the amount of property taken over and the average for the test period, and, as to paragraph (a), for any difference in use between that of the test period and during Federal control which in the opinion of the Commission is

substantial enough to be considered, so that the result shall be, as nearly as practicable, the same relative amount, character, and durability of physical reparation."

In applying this rule to determine the maintenance expenses which should be allowed in fixing the amount necessary to make good the guaranty, the Commission determined an equation factor (which will be referred to in more detail on other pages) to represent the difference "between the cost of labor and material" in the test period and the guaranty period, respectively. Then, to determine the amount of maintenance which should be allowed during the guaranty period, the Commission applied this equation factor to one-sixth of the total expenditures for maintenance during the test period. The result, then, is that the maintenance allowance is based on six average months of the full three-year test period, necessarily reflecting the experience of the carrier as to maintenance during the fall and winter months as well as the experience during the spring and summer months. Our contention is that a maintenance allowance for the six months —March to August, inclusive,—of the guaranty period, which shall "as nearly as practicable" represent "the same relative amount, character, and durability of physical reparation" as was made during the test period, must give effect only to the carrier's experience during the corresponding months of March to August, inclusive, in each of the three years of the test period.

Because of climatic, operating and traffic conditions on the Great Northern, the great bulk of the work of maintenance of way and structures, which includes the main-

tenance of roadbed and track, bridges, buildings and other structures, is performed during the late spring and early summer months of each year (R. 14). The court will appreciate why it is impossible in this northern climate, where the road and track are frozen solid for a large portion of the year, to do any track maintenance work in the winter months. Necessarily the work must be concentrated in the warmer months. To make an allowance based in part on the low winter expenditures is to fail to reflect accurately the actual experience of the carrier in the test period.

The evidence will show that the condition on the Great Northern is extreme and that in other portions of the western territory conditions are such that the carriers can distribute their maintenance expenditures more uniformly throughout the year. Consequently, the application of the Commission's rule will be a less serious matter to carriers whose conditions are not as extreme as ours are.

This error of the Commission is one of law and not of fact because it is a misinterpretation of the provisions of the Federal Control contract hereinbefore quoted, which provide that the annual expenditure for maintenance during the period of Federal control shall be equal to the average annual expenditure during the test period, to the end "that the result shall be as nearly as practicable the same relative amount, character and durability of physical reparation." It was necessary to adapt this provision for "annual expenditure" to a six-months period, which necessarily involved an interpretation of the statute, as to which the only guide is the statement requiring the same relative amount, character and durability of physical reparation.

The Commission not only failed to adopt what we believed to be the proper construction of the statute but it went farther and assumed that the opposite construction was definitely established by the statute. It said (111 I. C. C. 318, 325) (R. 90) "in any event such a claim could not be considered because the law definitely fixes as a base the average six months of the three-year test period." It is quite obvious that whether we are right or wrong in our construction, the Commission is wrong in assuming that the law definitely fixes the contrary. Where the Commission has made a decision and it affirmatively appears that in making the decision the Commission was acting under a mistaken view of the law, this is sufficient ground for the enjoining of the order. *U. S. v. New York Central*, 263 U. S. 603.

The opinion of the Commission that the law definitely fixes an average six months of the test period as the base is evidently based upon the fact that under Section 209 (c) (1) of the Transportation Act the amount of compensation guaranteed to the carrier is one-half of the annual compensation named in the Federal Control contract, which would amount to the net income for an average six months of the test period. But the Commission overlooks the fact that the statute is here speaking of *net* income and not of expenditures for maintenance. There is no corresponding provision covering expenditures for maintenance.

It might be assumed that an analogy exists between net income and expenditures for maintenance or that any error involved in using an average six months in the computation of income would be offset by likewise using an average six months in the computation of maintenance

expense. As a matter of fact, however, the reverse may be true. In order to illustrate this let us assume the case of a carrier which operates only in the summer, such as a summer resort railroad or logging railroad, and which earns its entire income and incurs all of its expense during the months from March to August, inclusive. Such a carrier during 1920 would have earned its entire year's income during the six months of the guaranty period but under the guaranty it would receive only one-half of a year's income. If such a railroad had accepted the provisions of the Guaranty Act it would be compelled to pay the other half of its earnings over to the Government. This illustration makes it clear that the use of an average six months of the test period in computing net income for the guaranty period may work an injustice to the carrier.

On the other hand this carrier which likewise incurred all of its year's expense during the six months of the guaranty period, would receive from the Government only half of such expenditures. The injustice wrought by Section 209(c) (1) using an average six months as the basis of income would not be offset by likewise using an average six months as the basis for expenditures, as the Commission has done, but would, on the contrary, be increased and magnified. The same thing would be true of an all the year road which had its heaviest income and expense in the summer months.

If we assume the case of a railroad carrying on all of its business in the months from September to February, inclusive, such railroad in 1920, would have earned its regular normal income for the full year in the months outside of the guaranty period and in addition would receive from the Government under the Guaranty Act a bonus

of one-half of a year's income. This carrier would incur no expense during the months of the guaranty period but the Commission's method of computing expenditures for maintenance would nevertheless allow it one-half of the amount which it expended annually during the test period although its actual expenditure during the guaranty period was nothing. It would thus receive a bonus under Section 209 (c) (1) in the computation of its net income and would be given another bonus by the Commission's method of computation, equal to half of its annual maintenance expenses. These illustrations make it clear that there is no proper analogy between the method of computing income which is adopted by Section 209 (c) (1) and the method of computing expenditure which should be adopted under Section 209(f) (3), and that instead of the Commission's error tending to offset or correct any injustice under Section 209(c) (1) it may tend to distort and magnify.

Another error of law charged in the petition appears in paragraph XVI of the complaint (R. 16). We have already pointed out that Section 209(f) (3) required the Commission to make allowance for maintenance expenditures during the guaranty period and provided that in making such allowance it should be governed by Section 5 (c) of the Federal control contract. That section provided that due allowance should be made, among other things, for differences in the cost of labor and material between the two periods (R. 13). The question of law involved is whether this language refers to differences in labor and material costs necessarily incurred by the carrier under consideration or whether it refers to differences in the general level of such costs. We allege

that the Commission refused either to determine or to give controlling effect to the differences existing in the costs necessarily incurred by the Great Northern and that instead it determined a factor for increase which reflected the general levels or the experience of other carriers.

In support of our contention that the provisions of the statute and of the Federal Control contract necessarily referred to the costs necessarily incurred by the individual carrier we point to the fact that the Federal Control contract was not a blanket contract made with several carriers, but that it was in each case made with an individual carrier and necessarily referred to the costs incurred by that carrier. We also point to the proviso: "That the result shall be, as nearly as practicable, the same relative amount, character and durability of physical reparation" (R. 13). An application of this proviso requires that the differences in costs necessarily incurred by the individual carrier be given controlling effect.

The erroneous results of the Commission's method may be made clear by the following illustrations: Suppose that, on the average, wages were trebled and material costs were doubled. A carrier which used labor and material in equal proportion would have an average equation factor of 2.50 but a carrier which used twice as much labor as materials would have an equation factor of 2.67. The increase in the price of any given kind of labor or any given kind of material might be the same on both roads but the proportion of high cost items and low cost items might vary. Moreover, the cost of rails and ties at the point of production may have trebled while the freight rates incurred for carrying them to the point of consumption in fact only increased approximately 40%. On a

road located near the region of production the costs would consist almost entirely of the amount paid to the manufacturer and would have doubled or trebled. On a road located far from the region of production the cost might consist more largely of transportation costs, which would have increased only 40%. The petition alleges that because of differences in the proportion of high cost and low cost items and other similar differences which were peculiar to the Great Northern its necessary equation factor was as a matter of mathematical demonstration substantially different from and independent of the factors for other railroads and that nevertheless the Commission refused to determine an equation factor for the Great Northern, but simply determined an equation factor for other railroads and applied it to the Great Northern with no allowance, or an insufficient allowance, for the peculiar conditions existing on the Great Northern. We believe that the court must find as a matter of mathematical demonstration that this was either an illegal and erroneous method or that the conclusions are illegal and erroneous because contrary to the mathematically demonstrable and undisputed evidence. The Commission's method produced a factor of 2.45 whereas the factor mathematically demonstrable from conditions existing on the Great Northern is 2.57. This involves a difference of $1,000,000 in the computation of the guaranty.

Paragraph XVII of the Petition (R. 18) has to do with the effectiveness of labor. Our claim is in no way based upon any difference between the efficiency of an hour's labor in the test period and an hour's labor in the guaranty period. An illustration will best describe this claim. Let us suppose that during the test period a man received

50 cents an hour for a 10-hour day, or a total of $5 per day. Of this 10 hours, one hour was consumed in getting to and from the work, getting started on the work and closing up at the end of the day. This leaves 9 effective hours of work for which he is paid $5, which is at the rate of 55.5 cents per effective hour. Assume that the man doing the same kind of work received 50 cents an hour during the guaranty period for an 8-hour day, or a total of $4 per day. Again one hour would be consumed in getting to and from the work and in starting and closing up the job, leaving 7 effective hours, which would be at the rate of 57.1 cents per effective hour. In this situation the Commission would determine an equation factor of 1.00 (50:50) as the difference "between the cost of labor" in the two periods, whereas we assert that the equation factor should be 1.03 (57.1:55.5). Of course, the hourly rates in the test period and the guaranty period were not the same, but the foregoing example illustrates the effect of the Commission's method and the method which we assert should be used, and this same effect would be present if we used the actual rates paid during each of the two periods.

Under the allegations of the petition it is a matter of mathematical demonstration that the Commission's conclusion is erroneous in this respect. The Commission is called upon to apply the provisions of the Federal Control contract which provide for due allowance for differences in the cost of labor. The contention which we make involves a legal interpretation of this provision. The Commission holds that "cost of labor" is synonymous with "price of labor per unit of time paid for," while we contend that the phrase is synonymous with the phrase "cost

per unit of work accomplished." This is a question of legal interpretation which should be passed upon by the court. The petition alleges, and we are prepared to prove by submitting the Commission's own language, that it made no attempt to determine the difference in costs per unit of work accomplished but that it determined instead merely differences in costs per unit of time paid for.

We do not ask that this court find as a fact the amount necessary to make good the guaranty. We simply ask the court to state the correct rules of law, and, if it determines that the Commission has erred as a matter of law, to enjoin the erroneous certificate.

CONCLUSION.

For the foregoing reasons we submit that the lower court, sitting pursuant to the Urgent Deficiencies Act, had jurisdiction, and that it was necessary that the jurisdiction should be exercised in order to prevent serious and irreparable injury to appellant, and we pray this court to reverse the order and remand the case to the lower court with directions to exercise the jurisdiction which that court possesses and to consider the appellant's petition upon its merits.

Respectfully submitted,

F. G. DORETY,
THOMAS BALMER,
FLETCHER ROCKWOOD,
Solicitors for Appellant.

St. Paul, Minn.,
Mar. 30, 1928.

APPENDIX A.

TEXT OF PORTIONS OF SECTIONS 209 AND 212 OF TRANSPORTATION ACT, 1920.

Sec. 209(a) When used in this section—

The term "carrier" means (1) a carrier by railroad or partly by railroad and partly by water, whose railroad or system of transportation is under Federal control at the time Federal control terminates, or which has heretofore engaged as a common carrier in general transportation and competed for traffic, or connected, with a railroad at any time under Federal control; and (2) a sleeping car company whose system of transportation is under Federal control at the time Federal control terminates; but does not include a street or interurban electric railway not under Federal control at the time Federal control terminates, which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both; the term "guaranty period" means the six months beginning March 1, 1920.

The term "test period" means the three years ending June 30, 1917; and

The term "railway operating income" and other references to accounts of carriers by railroad shall, in the case of a sleeping car company, be construed as indicating the appropriate corresponding accounts in the accounting system prescribed by the Commission.

(b) This section shall not be applicable to any carrier which does not on or before March 15, 1920, file with the

Commission a written statement that it accepts all the provisions of this section.

(c) The United States hereby guarantees—

(1) With respect to any carrier with which a contract (exclusive of so-called cooperative contracts or waivers) has been made fixing the amount of just compensation under the Federal Control Act, that the railway operating income of such carrier for the guaranty period as a whole shall not be less than one-half the amount named in such contract as annual compensation, or, where the contract fixed a lump sum as compensation for the whole period of Federal operation, that the railway operating income of such carrier for the guaranty period as a whole shall not be less than an amount which shall bear the same proportion to the lump sum so fixed as six months bears to the number of months during which such carrier was under Federal operation, including in both cases the increases in such compensation provided for in section 1 of the Federal Control Act;

* * * * *

(d) If for the guaranty period as a whole the railway operating income of any carrier entitled to a guaranty under paragraph (1), (2), or (4) of subdivision (c) is in excess of the minimum railway operating income guaranteed in such paragraph, such carrier shall forthwith pay the amount of such excess into the Treasury of the United States. If for the guaranty period as a whole the railway operating income of any carrier entitled to a guaranty under paragraph (3) of subdivision (c) is in excess of one-half of the annual sum fixed by the President with respect to such carrier under section 4 of the Federal Control Act, such carrier shall forthwith pay the amount

of such excess into the Treasury of the United States. The amounts so paid into the Treasury of the United States shall be added to the funds made available under section 202 for the purposes indicated in such section. Notwithstanding the provisions of this subdivision, any carrier may retain out of any such excess any amount necessary to enable it to pay its fixed charges accruing during the guaranty period.

(e) For the purposes of this section railway operating income, or any deficit therein, for the test period shall be computed in the manner provided for in section 1 of the Federal Control Act.

(f) In computing railway operating income, or any deficit therein, for the guaranty period for the purposes of this section—

(1) Debits and credits arising from the accounts, called in the monthly reports to the Commission equipment rents and joint facility rents, shall be included, but debits and credits arising from the operation of such street electric passenger railways, including railways commonly called interurbans, as are not under Federal control at the time of termination thereof, shall be excluded;

(2) Proper adjustments shall be made (a) in case any lines which were, during any portion of the period of Federal control, a part of the railroad or system of transportation of the carrier, and whose railway operating income was included in such income of the carrier for the test period, do not continue to be a part of such railroad or system of transportation during the entire guaranty period, and (b) in case of any lines acquired by, leased to, or consolidated with, the railroad or system of transportation of the carrier at any time since the end of the test period

and prior to the expiration of the guaranty period, for which separate operating returns to the Commission are not made in respect to the entire portion of the guaranty period;

(3) There shall not be included in operating expenses, for maintenance of way and structures, or for maintenance of equipment, more than an amount fixed by the Commission. In fixing such amount the Commission shall so far as practicable apply the rule set forth in the proviso in paragraph (a) of section 5 of the "standard contract" between the United States and the carriers (whether or not such contract has been entered into with the carrier whose railway operating income is being computed);

(4) There shall not be included any taxes paid under Title I or II of the Revenue Act of 1917, or such portion of the taxes paid under Title II or III of the Revenue Act of 1918 as by the terms of such Act are to be treated as levied by an Act in amendment of Title I or II of the Revenue Act of 1917; and

(5) The Commission shall require the elimination and restatement of the operating expenses and revenues (other than for maintenance of way and structures, or maintenance of equipment) for the guaranty period, to the extent necessary to correct and exclude any disproportionate or unreasonable charge to such expenses or revenues for such period, or any charge to such expenses or revenues for such period which under a proper system of accounting is attributable to another period.

(g) The Commission shall, as soon as practicable after the expiration of the guaranty period, ascertain and certify to the Secretary of the Treasury the several amounts necessary to make good the foregoing guaranty to each

carrier. The Secretary of the Treasury is hereby authorized and directed thereupon to draw warrants in favor of each such carrier upon the Treasury of the United States, for the amount shown in such certificate as necessary to make good such guaranty. An amount sufficient to pay such warrants is hereby appropriated out of any money in the Treasury not otherwise appropriated.

(h) Upon application of any carrier to the Commission, asking that during the guaranty period there may be advanced to it from time to time such sums, not in excess of the estimated amount necessary to make good the guaranty, as are necessary to enable it to meet its fixed charges and operating expenses, the Commission may certify to the Secretary of the Treasury the amount of, and times at which, such advances, if any, shall be made. The Secretary of the Treasury, on receipt of such certificate, is authorized and directed to make the advances in the amounts and at the times specified in the certificate, upon the execution by the carrier of a contract, secured in such manner as the Secretary may determine, that upon final determination of the amount of the guaranty provided for by this section such carrier will repay to the United States any amounts which it has received from such advances in excess of the guaranty, with interest at the rate of 6 per centum per annum from the time such excess was paid. There is hereby appropriated, out of any money in the Treasury not otherwise appropriated, a sum sufficient to enable the Secretary of the Treasury to make the advances referred to in this subdivision.

* * * * *

SEC. 212. [*Added February 26, 1921.*] (a) In making certifications under section 204 or section 209, the Com-

mission, if not at the time able finally to determine the whole amount due under such section to a carrier or the American Railway Express Company, may make its certificate for any amount definitely ascertained by it to be due, and may thereafter in the same manner make further certificates, until the whole amount due has been certified. The authority of and direction to the Secretary of the Treasury under such sections to draw warrants is hereby made applicable to each such certificate. Warrants drawn pursuant to this section, whether in partial payment or in final payment, shall be paid: (1) If for a payment in respect to reimbursement of a carrier for a deficit during the period of Federal control, out of the appropriation made by section 204; (2) if for a payment in respect to the guaranty to a carrier other than the American Railway Express Company, out of the appropriation made by subdivision (g) of section 209; and (3) if for a payment in respect to the guaranty to the American Railway Express Company, out of the appropriation made by the fifth paragraph of subdivision (i) of section 209.

(b) In ascertaining the several amounts payable under either of such sections, the Commission is authorized, in the case of deferred debits and credits which can not at the time be definitely determined, to make, whenever in its judgment practicable, a reasonable estimate of the net effect of any such items, and, when agreed to by the carrier or express company, to use such estimate as a definitely ascertained amount in certifying amounts payable under either of such sections, and such estimates so agreed to shall be prima facie but not conclusive evidence of their correctness in amount in final settlement.

APPENDIX B.

Letter Submitted by Hon. Edgar E. Clark.

Interstate Commerce Commission,
Washington, January 22, 1921.

Hon. John J. Esch,
Chairman Committee on Interstate and Foreign Commerce, House of Representatives.

Dear Sir:

This morning Representative Sims, member of your committee, called and discussed with me some features of H. R. 15713, more particularly paragraph (b) of Section 212.

Mr. Sims thought that there was difference of understanding as to the intent of the language in this paragraph, and he asked that I write you my conception of the manner in which, if enacted in its present form, it would be interpreted and applied by the Commission.

Paragraph (a) of Section 212 very definitely authorizes certificates in partial payment and payment of such certificates. It will be noted that such certificates are by the terms of this paragraph to be "for any amount definitely ascertained by it (the Commission) to be due." I think there is no misunderstanding in that language. There is no room for misunderstanding of our conception of our duties under it, which is that a partial payment certificate would not be made for any amount in excess of an amount "definitely ascertained" by us to be due the carrier.

Paragraph (b) provides that as to deferred debits and credits which can not at the time be definitely determined

the Commission may when it is deemed practicable make a reasonable estimate of the net effect of such deferred debits and credits and when agreed to by the carrier or express company to use such estimate as a definitely ascertained amount in certifying sums payable and provides that such estimates so agreed to shall be binding in final settlement.

Judge Sims thinks that this language is susceptible of interpretation which would authorize the Commission to make estimates of deferred debit and credit items in connection with partial payments, leaving other deferred debit and credit items for consideration in connection with other or further certificates or final settlement. I think that the language is susceptible of that interpretation, but I do not understand that the Commission has any thought of so using it, and I do not conceive that the Commission would so use it. The authority is permissive. The paragraph contemplates making a reasonable estimate of the net effect of such deferred debit and credit items and using them under agreement with the carriers as a basis for a final settlement. Under that permissive authority the Commission would be under the moral obligation to preserve to all reasonable extent the interests and welfare of the Government, and it would be its purpose so to do. The amount of money involved in the deferred debit and credit items is not a large item as compared with the amount of the guaranty. The purpose of this paragraph, as I understand it, is to make possible speedy and final settlements under terms fair to the carrier and fair to the Government, and to make final settlement under such an agreement rather than to have some of these claims drag along for many months or years waiting the final determination of

the debit and credit items, which final determination might in small measure affect the balance.

Yours very truly,

EDGAR E. CLARK,
Chairman Interstate Commerce Commission.

(Hearings before the Committee on Interstate and Foreign Commerce of the House of Representatives, Sixty-sixth Congress. Third Session, on H. R. 15551 and H. R. 15713, January 14 and 15, 1921, pp. 108-109.)